Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v Bursa Malaysia Securities Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-122–10 OF 2017(W)
VERNON ONG, ZALEHA YUSOF AND ZABARIAH MOHD FCJJ
1 APRIL 2022

Civil Procedure — Appeal — Appeal to Federal Court ('FC') — Whether leave question posed to FC had to incorporate a point of law which if answered would reverse the conclusions made by the Court of Appeal — Whether FC could not be called upon to answer a leave question concerning a matter in respect of which no determination had been made by the courts below — Whether FC's answer to a leave question should not waste the court's time and be a fruitless exercise that had no determinative effect on the appeal before the court — Whether even if leave to appeal had been granted FC had the power in an appropriate case to refuse to answer a leave question posed

The appellants were the former directors of a company ('Cepatwawasan') that was listed on the main board of the respondent stock exchange. The appellants had caused a wholly-owned subsidiary of Cepatwawasan to pay RM13m to a company ('Opti Temasek') and RM3m to an individual ('Sheikh Abdul Rahim') in violation of the respondent's listing requirements. As a result, the respondent's listing committee ('LC') imposed penalties on the appellants under s 360 of the Capital Markets and Services Act 2007 ('the CMSA'). The appellants' attempts to set aside those penalties via an appeal to the respondent's appeal committee, then via a judicial review application in the High Court and finally by an appeal to the Court of Appeal ('COA') all ended in failure. As the appellants failed to comply with the penalties, the respondent obtained an enforcement order ('the CMSA order') from the High Court compelling the appellants to jointly and severally repay to Cepatwawasan within 30 days the total RM16m that was paid to Opti Temasek and Sheikh Abdul Rahim. The COA affirmed the CMSA order. The Federal Court denied the appellants leave to appeal further. The respondent filed committal proceedings against the appellants on their continued failure to obey the CMSA order. The High Court found them guilty of contempt and fined the first and second appellants RM2m (in default 30 days' jail) and the third appellant RM100,000 (in default 14 days' jail). The COA dismissed the appellants' appeals against the decision and allowed a cross-appeal by the respondent to enhance the sentence. In the result, the COA ordered that if the appellants failed to comply with the CMSA order within three months of its decision, the first and second appellants would be sent to jail for five years and the third appellant, for a year. Leave was granted to the appellants to file the

instant appeal on the following questions of law: (a) whether a failure to comply with an order to refund money under a money judgment could attract contempt proceedings ('question 1'); and (b) whether leave under s 8(1) of the Bankruptcy Act 1967 ('BA') was required before: (i) proceedings were commenced against a bankrupt for a CMSA order ('question 2'); or (ii) committal proceedings were commenced against a bankrupt to enforce a CMSA order ('question 3'). The appellants argued, inter alia, that: (A) the CMSA order and the contempt proceedings against the first appellant were void because he was at all material times a bankrupt and the respondent did not obtain leave of court under s 8(1) of the BA before commencing the respective proceedings; (B) the CMSA order was essentially a money judgment and was not enforceable by way of contempt proceedings under O 45 of the Rules of Court 2012; and (C) the CMSA order had been invalidated by the settlement of monies due to Cepatwawasan pursuant to a consent judgment.

Held, unanimously dismissing the appeal, affirming the COA's decision and declining to answer the leave questions posed to the court:

(1) The questions of law that were posed in the instant appeal did not relate to matters in respect of which a determination had been made by the courts below. The issues raised in the questions were not addressed or argued in the judicial review proceedings or in the proceedings for the obtaining of the CMSA order, nor did they arise from the judgments of the courts below in respect of the committal proceedings. Although leave to appeal was granted on the three questions, that did not prevent the court from declining to answer them as the issues/matters raised therein were not issues/matters that arose or were decided by the courts below. Answering the questions posed had no determinative effect on the appeal before the court (see paras 76–80).

(2) The questions posed before this court had to be couched to incorporate a point of law, which, if answered, would have the effect of reversing the conclusions made by the COA without any evaluation of the evidence. As the COA did not make any determination on the questions posed, answering them would not have any effect on the appellant's appeal (see para 44).

(3) The CMSA order did not require the appellants to pay to the respondent but to restore to Cepatwawasan monies that were wrongly paid out to Opti Temasek and Sheikh Abdul Rahim. There was no debtor-creditor relationship between the appellants and the respondent. Therefore, the question posed to the court of whether committal proceedings could issue against the appellants for non-compliance with a money judgment to refund monies was not an issue that was raised in the courts below either before the judge who heard the committal proceedings or before the judges in the COA. The judges in the courts below had not addressed

their minds to that issue and it would be presumptuous for this court to guess what the courts below would have decided on that question. In other words, question 1 did not relate to a matter in respect of which a determination had been made by the COA. This court therefore declined to answer question 1 (see paras 38, 41–43 & 47).

(4) Cloaked under question 1 was the attempt by the appellants to collaterally attack the making of the CMSA order — and that was outside the scope of the instant appeal. The appeal was against the committal order and the issue was whether the appellants had refused to comply with the CMSA order. Since leave was not granted by this court to the appellants to raise arguments that attacked the making of the CMSA order, they were not permitted to raise them. The appellants could not at this stage be permitted to attack the validity of the CMSA order which they previously had had the opportunity to challenge before different forums and which they had failed to set aside (see paras 33, 48, 50–51 & 59).

(5) Question 2 also sought to challenge the validity of the CMSA order. At the time when the proceedings to obtain the CMSA order were commenced, the first appellant was already a bankrupt. But he never disclosed that fact and did not seek the necessary sanction and approval to appoint solicitors to represent him in those proceedings. The instant appeal was against the committal order and not to consider whether the CMSA order was valid or not. The validity of the CMSA order was affirmed by the COA and leave to appeal to the Federal Court was dismissed. It was not for this court to reverse the decision of the courts below premised on the question posed when the issue raised in question 2 was never addressed, argued or canvassed by the parties in the courts below and in respect of which issue the courts below did not make any determination. The first appellant attempted and failed to challenge the CMSA order in the courts below and he had exhausted all avenues of appeal right up to the Federal Court to challenge the same but failed. Hence, the CMSA order, for all intents and purposes, was valid and binding. Accordingly, this court declined to answer question 2 (see paras 61–66).

(6) Section 8(1) of the Bankruptcy Act 1967 only applied to a creditor. The respondent was not a creditor to whom the appellants owed a debt, whether provable in bankruptcy or otherwise. The CMSA order did not create a debtor-creditor relationship between the appellants and the respondent but instead directed the appellants to restore monies to Cepatwawasan. The monies referred to in the CMSA order were also not debts or liabilities provable in bankruptcy as envisaged under s 40 of the Bankruptcy Act. Hence, s 8(1) of the Bankruptcy Act had no application whatsoever to the instant appeal as there was no debt owing by the

appellants to the respondent. Questions 2 and 3 were not applicable to the second and third respondents. In any event, the issue raised in both the questions was never raised in the courts below (see paras 68–75).

[Bahasa Malaysia summary

Perayu merupakan bekas pengarah syarikat ('Cepatwawasan') yang tersenarai di papan utama pasaran saham responden. Perayu telah menyebabkan anak syarikat yang dimiliki sepenuhnya oleh Cepatwawasan untuk membayar RM13 juta kepada satu syarikat ('Opti Temasek') dan RM3 juta kepada satu individu ('Sheikh Abdul Rahim') bertentangan dengan syarat penyenaraian responden. Sebagai kesan, jawatankuasa penyenaraian (LC) mengenakan penalti kepada perayu dbawah s 360 Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') cubaan perayu untuk mengenepikan penalti tersebut melalui satu rayuan kepada jawatankuasa rayuan responden, dan kemudiannya melalui permohonan semakan kehakiman di Mahkamah Tinggi dan akhir sekali melalui rayuan ke Mahkamah Rayuan yang kesemuanya gagal. Atas sebab perayu gagal untuk mematuhi penalti, responden memperoleh perintah penguatkuasaan (perintah APMP) dari Mahkamah Tinggi memaksa perayu secara bersama dan berasingan untuk membayar semula kepada Cepatwawasan dalam tempoh 30 hari jumlah RM16 juta yang telah dibayar kepada Opti Temasek dan Sheikh Abdul Rahim. MR mengesahkan perintah APMP tersebut. Mahkamah Persekutuan menafikan perayu izin untuk merayu lanjut. Responden telah memfailkan perintah komital terhadap perayu dan kegagalan mereka untuk mematuhi perintah APMP. Mahkamah Tinggi mendapati mereka bersalah untuk penghinaan dan menyaman perayu pertama dan kedua RM2 juta (sekiranya gagal bayar 30 hari penjara) dan perayu ketiga RM100,000 (sekiranya gagal bayar 14 hari penjara). MR menolak rayuan perayu terhdap keputusan dan membenarkan rayuan silang responden untuk meningkatkan hukuman. Sebagai kesan, MR memerintahkan sekiranya perayu gagal untuk mematuhi perintah APMP dalam masa tiga bulan dari keputusannya, perayu pertama dan kedua akan dipenjarakan untuk tempoh lima tahun dan untuk perayu ketiga satu tahun penjara. Izin diberikan kepada perayu untuk memfailkan rayuan ini atas soalan berikut: (a) sama ada kegagalan untuk mematuhi perintah untuk memulangkan wang dibawah satu perintah wang boleh menyebabkan prosiding penghinaan (soalan 1); dan (b) sama ada izin di bawah s 8(1) Akta Kebankrapan 1967 ('AB') diperlukan sebelum: (i) prosiding dimulakan terhadap seorang bankrap untuk perintah APMP (soalan 2); atau (ii) prosiding komital dimulakan terhadap seorang bankrap untuk menguatkuasakan perintah APMP (soalan 3). Perayu menghujahkan antara yang lain, bahawa: (A) perintah APMP dan prosiding penghinaan terhadap perayu pertama adalah terbatal kerana dia pada semua masa material merupakan seorang yang bankrap dan responden tidak mendapatkan izin mahkamah dibawah s 8(1) AB sebelum memulakan prosiding tersebut; (B) perintah APMP merupakan satu perintah wang dan tidak boleh dikuatkuasakan dengan cara prosiding penghinaan dibawah A 45

Kaedah-Kaedah Mahkamah 2012; (C) perintah telah dibatalkan dengan wang penyelesaian yang terhutang kepada Cepatwawasan selaras dengan penghakiman persetujuan.

Diputuskan, sebulat suara mengepkan rayuan, mengekalkan keputusan MR dan tidak menjawab soalan izin yang dikemukakan kepada mahkamah:

(1) Persoalan undang-undang yang dikemukakan di dalam rayuan ini tidak berkaitan dengan perkara berkaitan dengan apa yang merupakan keputusan yang dibuat oleh mahkamah terdahulu. Isu yang dibangkitkan dalam soalan tidak dijawab atau dihujahkan di dalam prosiding semakan kehakiman atau prosiding untuk mendapatkan perintah APMP, mereka juga tidak timbul dari penghakiman mahkamah terdahulu berkaitan dengan prosiding komital. Walaupun izin dibenarkan untuk tiga soalan berikut, ianya tidak menghalang mahkamah dari enggan untuk menjawabnya kerana isu/perkara yang dibangkitkan bukanlah isu/pereka yang timbul atau diputuskan oleh mahkamah terdahulu. Menjawab soalan yang dikemukakan tidak membawa apa-apa kesan yang menentukan terhadap rayuan dihadapan mahkamah (lihat perenggan 76–80).

(2) Soalan yang dikemukakan dihadapan mahkamah ini perlulah melibatkan satu persoalan undang-undang, yang mana, sekiranya dijawab, mempunyai kesan untuk menerbalikkan kesimpulan yang dibuat oleh MR tanpa apa-apa penafsiran keterangan. Kerana MR tidak membuat apa-apa penentuan atas soalan yang dikemukakan, menjawabnya tidak akan mempunyai apa-apa kesan terhadap rayuan perayu (lihat perenggan 44).

(3) Perintah APMP tidak memerlukan perayu untuk membayar kepada responden akan tetapi memulihkan wang Cepatwawasan yang dibayar secara salah kepada Opti Temasek dan Sheikh Abdul Rahim. Tiada hubungan penghutang-pemiutang antara perayu dan responden. Oleh itu, soalan yang dikemukakan kepada mahkamah sama ada prosiding komital boleh dikeluarkan terhadap perayu untuk kegagalan untuk mematuhi dengan penghakiman wang untuk memulangkan wang bukan satu isu yang dibangkitkan di mahkamah terdahulu yang mendengar prosiding komital atau dihadapan hakim di MR. Hakim di mahkamah terdahulu tidak memikirkan isu dan ianya adalah tidak sesuai untuk mahkamah ini untuk membuat tekaan apa mahkamah terdahulu akan memutuskan berkaitan dengan soalan tersebut. Dalam kata lain, soalan 1 tidak berkait dengan perkara berkaitan dengan mana keputusan yang dibuat oleh MR. Mahkamah ini oleh yang demikian enggan untuk menjawab soalan 1 (lihat perenggan 38, 41–43 & 47).

(4) Diselindungi dibawah soalan 1 merupakan cubaan perayu untuk secara bersama menyerang pembuatan perintah APMP — dan ianya di luar

A skop rayuan ini. Rayuan adalah terhadap perintah komital dan isu adalah sama ada perayu enggan untuk mematuhi perintah APMP. Memandangkan perintah tidak dibenarkan oleh mahkamah ini untuk perayu membangkitkan hujahan yang menyerang pembuatan perintah APMP, mereka tidak dibenarkan untuk membangkitkan mereka. Perayu B tidak boleh di peringkat ini dibenarkan untuk menyerang kesahihahan perintah APMP yang mana mereka sebelum ini diberikan peluang untuk mencabarnya dihadapan forum berlainan yang mana mereka telah gagal untuk mengenepikan (lihat perenggan 33, 48, 50–51 & 59).

C (5) Soalan 2 juga cuba untuk mencabar kesahihan perintah APMP. Pada masa yang sama prosiding untuk mendapatkan perintah APMP telah dimulakan, perayu pertama sudahpun seorang yang bankrap namun dia tidak pernah memberitahu fakta tersebut dan tidak mendapatkan saksi yang perlu dan kebenaran untuk melantik peguam untuk mewakilinya D dalam prosiding tersebut. Rayuan ini adalah terhadap perintah komital dan bukan untuk menimbangkan sama ada perintah APMP adalah sah atau tidak. Kesahihan perintah APMP dikekalkan oleh MR dan rayuan ke Mahkamah Persekutuan telah ditolak. Ianya bukan untuk mahkamah ini untuk menerbalikkan keputusan mahkamah terdahulu berdasarkan E soalan yang dikemukakan apabila isu yang dibangkitkan dalam soalan 2 tidak pernah dikemukakan, dihujahkan atau diperiksa oleh pihak-pihak dalam mahkamah terdahulu dan berkaitan dengan isu yang mana mahkamah terdahulu tidak membuat apa-apa penentuan. Perayu pertama cuba dan gagal untuk mencabar perintah APMP dalam F mahkamah terdahulu dan dia telah menghabiskan semua cara untuk merayu sehingga ke Mahkamah Persekutuan untuk mencabar perkara yang sama akan tetapi gagal. Oleh yang demikian, perintah APMP untuk semua sebab dan tujuan, adalah sah dan mengikat. Oleh yang itu, mahkamah ini enggan untuk menjawab soalan 2 (lihat perenggan G 61–66).

(6) Seksyen 8(1) Akta Kebankrapan hanya terpakai kepada pemiutang. Responden bukanlah seorang pemiutang yang mana perayu mempunyai hutang kepada, sama ada boleh dibuktikan dalam bankrapsi atau tidak. Perintah APMP tidak mewujudkan hubungan penghutang-pemiutang H antara perayu dan responden, akan tetapi mengarahkan perayu untuk memulangkan wang kepada Cepatwawasan. Wang yang dirujuk dalam perintah APMP juga bukanlah hutang atau liabiliti yang dibuktikan dalam bankrapsi sepertimana yang digambarkan dibawah s 40 Akta Kebankrapan. Oleh yang demikian, s 8(1) tidak mempunyai apa-apa I pemakaian kepada rayuan ini dan tiada sebarang hutang yang terhutang oleh perayu kepada responden. Soalan 2 dan 3 tidak terpakai kepada responden kedua dan ketiga. Dalam apa keadaan, isu yang dibangkitkan dalam kedua-dua soalan tidak pernah dibangkitkan dalam mahkamah terdahulu (lihat perenggan 68–75).]

Cases referred to

Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal [2020] 1 MLJ 689, FC (folld)
Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd [2010] 5 MLJ 222, FC (refd)
Hong Kwi Seong v Ganad Media Sdn Bhd [2013] 2 MLJ 251, CA (refd)
Hong Leong Bank Berhad v Phung Tze Thiam @ John Phuang [2008] MLJU 288; [2008] 4 CLJ 742, CA (refd)
Meidi-Ya Co Ltd, Japan & Anor v Meidi (M) Sdn Bhd [2009] 2 MLJ 14, CA (refd)
Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513, FC (refd)
Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor [2018] 4 MLJ 34; [2018] 4 CLJ 705, FC (refd)
Tan Heng Chew & Ors v Tan Kim Hor & Ors [2006] 5 MLJ 313, FC (folld)
Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689, FC (refd)
Tengku Dato' Kamal Ibni Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158, CA (refd)
The Minister for Human Resources v Thong Chin Yoong and another appeal [2001] 4 MLJ 225, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) ss 2, 8(1), 24, 40
Capital Markets and Services Act 2007 ss 354, 360, 360(1)(c), (c)(i), (1)(A), (1)(K), 360(1)(c)(ii)(M)
Rules of Court 2012 O 45 r 5(1), O 52 r 4
Rules of the Federal Court 1995 r 47

Appeal from: Civil Appeal No W-02(IM)(NCC)-1394–08 of 2016 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Jasbeer Singh Kaura and Wong Ming Yen with him) (Jasbeer Nur & Lee) for the appellants.
Preetha Pillai (Nimalan Devaraja and Muhammad Suhaib bin Mohamed Ibrahim with her) (Skrine) for the respondent.

Zabariah Mohd FCJ:

[1] This is the unanimous decision of this court. On 16 October 2017, this court allowed the application for leave to appeal to the appellants/defendants, based on the following questions of law:

A (a) where there is non-compliance of an order for the refund of monies which is a money judgment and not a judgment requiring the performance of an act, whether a court can find that there is contempt for the said non-compliance?

B (b) where proceedings are commenced for orders under s 360 Capital Markets and Services Act 2007 ('the CMSA') against a bankrupt, whether the plaintiff is obliged to obtain leave pursuant to s 8(1) of the Bankruptcy Act 1967 ('the BA'); and

C (c) where committal proceedings are commenced to enforce an order made under s 360 of the CMSA, against a bankrupt whether the applicant is obliged to obtain leave pursuant to s 8(1) of the Bankruptcy Act 1967.

BACKGROUND

D **[2]** In this judgment, we will refer to the parties, as they appear in the High Court, namely, the appellants as the defendants and the respondent as the plaintiff.

E **[3]** The first, second and fourth defendants (referred to as D1, D2 and D4 respectively) were the former directors of Cepatwawasan Group Bhd ('Cepatwawasan'), a company listed on the main board of Bursa Malaysia Bhd.

[4] The plaintiff is Bursa Malaysia Bhd which is a stock exchange licensed F under the Capital Markets and Services Act 2007 ('the CMSA').

[5] The defendants had caused Prolific Yield Sdn Bhd, a wholly owned subsidiary of Cepatwawasan to make payments of RM16m to a company called Opti Temasek Sdn Bhd and one individual by the name of Sheikh Abdul G Rahim. Such payments were found to be in violation of section 16.11 (a) of the listing requirements of the plaintiff. As a result, on 12 July 2005 the plaintiff issued a show cause to the defendants. Subsequently, on *13 October 2005* the plaintiff's listing committee made a finding that the defendants had breached H the listing requirements and imposed penalties against the defendants under ss 360(1)(c)(i), (1)(A) and (1)(K) of the the CMSA.

[6] The defendants appealed to the appeal committee of the plaintiff against the decision of the listing committee, raising, inter alia, allegations of I subjudice due to a pending suit in Kuala Lumpur Civil Suit No D3-22–1168 of 2004 (Suit 1168). Suit 1168 is elaborated in para 21 of this judgment.

[7] On 12 June 2006, the appeal committee dismissed the defendants' appeal.

[8] On 14 June 2006, the defendants filed a *judicial review application* at the Kuala Lumpur High Court vide Judicial Review Application No R1–25–2006 challenging the decision of the appeal committee. A

[9] On 18 January 2010 the Kuala Lumpur High Court dismissed the judicial review application with costs. The defendants appealed to the Court of Appeal against the said decision. B

[10] On 19 March 2013, the Court of Appeal dismissed the appeal. There was no application for leave to appeal filed in the Federal Court. C

Section 360 CMSA order

[11] On 26 May 2010 the plaintiff filed an Originating Summons No D-24NCC-168 of 2010 ('OS 168') at the Kuala Lumpur High Court to enforce the penalties imposed by the listing committee on 13 October 2005 (which was later affirmed by the appeal committee). On *28 December 2010* the High Court allowed the OS 168 with costs. The order in the OS 168 are as follows: D

(a) that within 30 days of the High Court order, D1 and D2 jointly and severally, restore to Cepatwawasan the RM13m paid to Opti Temasek Sdn Bhd; and E

(b) that within 30 days of the High Court order, the defendants, jointly and severally, restore to Cepatwawasan the RM3m paid to Sheikh Abdul Rahim. F

('s 360 CMSA order')

[12] The defendants (including D3) appealed to the Court of Appeal against the decision of the High Court on the s 360 CMSA order. On 16 December 2012 the Court of Appeal upheld the s 360 CMSA order ('Court of Appeal order dated 16 December 2012'), save for the variation that all the payments and acts stated in the order shall be carried out within 30 days of the date of the Court of Appeal order. G H

[13] The defendants' leave to appeal to the Federal Court was dismissed with costs on 28 December 2013.

Contempt proceedings I

[14] The defendants failed to comply with the Court of Appeal order dated *16 December 2012* (which is the s 360 CMSA order). As a result, on 5 December 2014, the plaintiff, after obtaining leave from the High Court,

A filed a notice of application for an order of committal against the defendants pursuant to O 52 r 4 of the Rules of Court 2012 ('the ROC') in encl 48.

[15] At the contempt proceedings, the plaintiff submitted that since the defendants failed to comply with both judgments by the High Court and
B Court of Appeal, the order of committal ought to be granted against them.

[16] There is no dispute the said defendants are fully aware of these two courts' orders and there is no dispute that the defendants were served with the
C relevant cause papers for the committal proceeding.

[17] The defendants contended that the committal proceeding is improper as there were orders that were made earlier and unknown to the said defendants affecting the case itself upon which the orders of the High Court and Court of
D Appeal were made.

[18] There is a consent judgment which was recorded by the relevant parties including the said defendants that had settled the two orders of the High Court and Court of Appeal (consent judgment). Hence, the contention of the
E defendants that the committal proceeding was wrongly undertaken by the plaintiff without full disclosure to this court regarding the consent judgment already recorded.

F **[19]** The defendants argued that the learned High Court judge had erred in law and fact when he failed to consider the *Suit 1168* and *OS 168* where both sought for similar reliefs. The fact that the defendants complied with the terms of the consent judgment made the conviction and the sentencing against the defendants in the committal proceedings as wrongful.

G

[20] The plaintiff has no jurisdiction to take action in the first place that has resulted in the two courts' orders.

[21] The action of the plaintiff is subjudice and prejudicial to the said
H defendants as there was a civil suit filed by Cepatwawasan (Suit 168) which the defendants alleged that the plaintiff was well aware of. Suit 168 was a suit against 18 defendants, which included the defendants herein which, inter alia sought for:

I (a) the sum of RM16m from D1-D4 and D14-D17;

(b) the sum of RM3m from D5-D7 and D9-D13;

(c) the sum of RM4m from D8; and

(d) interest.

High Court's findings and decision on the contempt proceedings A

[22] The court found that there are no merits in the contention of the said defendants resisting the order for committal for the following reasons:

(a) it is clear the arguments of the said defendants as narrated earlier sought to question the substantive suit itself that has resulted in the s 360 of the CMSA order; B

(b) it is too late in the day now for the said defendants to challenge the main suit; C

(c) the merits of the defence of the said defendants in the main suit itself should have been raised before the s 360 of the CMSA order was issued by the High Court and Court of Appeal respectively;

(d) with the issuance of the s 360 of the CMSA order, it is apparent the said defendants had lost the main suit instituted by the plaintiff against them; D

(e) it is not the duty of the court now to consider the merits of the defence of the said defendants in the main suit. That had already been decided by the High Court and Court of Appeal earlier. The application for leave to appeal to the Federal Court on the main suit was also dismissed; and E

(f) in the committal proceedings, the court is only concerned whether the said defendants had obeyed the s 360 CMSA order arising from the main suit itself. And these orders are final in nature requiring the said defendants to follow and comply with the same. F

[23] The court had sentenced the said defendants as follows:

(a) a fine of RM2m on D1 to be paid within 90 days from the date of sentencing and in default 30 days' imprisonment; G

(b) a similar fine also on D2 to be paid within 90 days from the date of sentencing and in default 30 days' imprisonment; and

(c) a fine of RM100,000 on D4 to be paid within 90 days from the date of sentencing and in default 14 days' imprisonment. H

[24] The court found that these sentences are appropriate and reasonable having regard to the fact that the said defendants had refused to obey the s 360 of the CMSA order. I

[25] These sentences also took into account the huge sums imposed to be paid by the said defendants as narrated earlier in the High Court's order and affirmed by the Court of Appeal's order.

[26] The High Court opined that the sentence imposed and meted out against the said defendants is fair, reasonable and commensurate with the non-compliance of the two courts' orders, namely, the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012.

Appeal to the Court of Appeal on the contempt proceedings

[27] Aggrieved with the decision of the High Court, the applicants/defendants appealed to the Court of Appeal.

[28] On 13 February 2017, the court found that there are no merits in the defendants' appeal and unanimously dismissed the defendants' appeal on the finding of contempt of all the defendants by the High Court.

[29] The Court of Appeal agreed with the findings of the High Court judge that both the orders of the High Court dated 28 December 2010 ('s 360 CMSA order'), as affirmed and varied by the Court of Appeal order dated 16 August 2012, have not been complied with, by the defendants. The Court of Appeal affirmed that part of the High Court order dated 1 July 2016 (ie the decision of the High Court on sentencing pursuant to the committal order and the imposition of fine).

[30] In respect of the defendants' appeal against sentence and the plaintiff's cross appeal on the same, Court of Appeal found there were merits in the cross appeal based on its findings as the court had referred to earlier, and unanimously allowed the cross-appeal and imposed an imprisonment term in the event the contempt was not purged within 30 days. The appeal by the defendants on sentence was dismissed.

[31] The Court of Appeal set aside that part of the High Court order dated 1 July 2016 and substituted it with the following orders:

(a) the defendants/appellants shall comply with the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal order dated 16 August 2012, within three months from 13 February 2017; and

(b) in default of the above, the court imposed the sentence of imprisonment on the respective defendants/appellants as follows:

(i) for D1 (Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar), five years imprisonment from the expiry of the three-month period;

(ii) for D2 (Lt Kol Tengku Dato' Kamarul Zaman Ibni Al Marhum Sultan

Sir Abu Bakar), five years imprisonment from the expiry of the three-month period; and

(iii) for D4 (Abdul Rahim bin Sendiri), one year imprisonment from the expiry of the three-month period, or upon the said defendants/appellants purging their contempt in accordance with the terms of the order of the High Court dated 28 December 2010, as affirmed and varied by the order of the Court of Appeal dated 16 August 2012, whichever is earlier.

Proceedings in the Federal Court

[32] Aggrieved by the decision of the COA, the defendants filed an application for leave to the Federal Court, which was granted on 16 October 2017. The defendants' grounds of appeal premised on the memorandum of appeal are as follows:

(a) the learned judges of the Court of Appeal erred in law and/or in fact in dismissing the defendants' appeal and allowing the plaintiff's cross appeal;

(b) the learned judges of the Court of Appeal erred in law in having affirmed the finding of the High Court that D1 and D3 were in contempt given the following matters:

(i) D1 was made a bankrupt on 13 September 2006 at which point the High Court made an adjudication and receiving order pursuant to s 24 of the Bankruptcy Act 1967 ('the BA');

(ii) the proceedings that culminated in the judgment dated 28 December 2010 in Kuala Lumpur High Court (OS 168) as varied by the Court of Appeal by way of orders dated 16 August 2012, which were the subject of the contempt proceedings herein were commenced on 5 November 2014. Additionally, the rulings of the plaintiff sought to be enforced by the plaintiff by way of OS 168 were made in proceedings that commenced on or about 26 May 2010;

(iii) the plaintiff was required by law to obtain the leave of the High Court pursuant to s 8(1) of the BA before commencing OS 168; and

(iv) as this was not done, the enforcement order vide OS 168 was made in excess of jurisdiction and therefore void.

(c) the learned judges of the Court of Appeal erred in law in having affirmed the findings of the High Court that D1 and D3 were in contempt given the following matters:

(i) D3 was made a bankrupt on 17 July 2014 at which point the High Court made an adjudication and receiving order pursuant to s 24 of the

BA;

(ii) similarly, the plaintiff was required by law to obtain the leave of the High Court pursuant to s 8(1) of the BA before commencing the contempt proceedings against D1 and D3;

(iii) the contempt proceedings were similarly commenced without leave of court pursuant to s 8(1) of the BA. The order of contempt granted by the High Court was in excess of jurisdiction and therefore void; and

(iv) the fact that the official assignee had stated that the plaintiff did not require sanction to proceed against D1 and D3 for the committal proceedings was immaterial.

(d) the learned judges of the Court of Appeal erred in law and/or fact in failing to appreciate that the subject of the contempt proceedings, that is the enforcement order pursuant to OS 168, was in law, a money judgment which was not enforceable by way of contempt proceedings under O 45 r 1 of the Rules of Court 2012;

(e) the learned judges of the Court of Appeal further erred in law and/or fact in concluding that the plaintiff had proven its case against the defendants for the order of committal and enhancing the sentence against the defendants; and

(f) in this regard, the High Court had disallowed the defendants from collaterally attacking the enforcement order pursuant to OS 168 in that the High Court did not allow the defendants to go behind the same. In so concluding, the defendants were precluded from relying on the following matters which would have had a material bearing on the contempt proceedings:

(i) Cepatwawasan had already entered into a consent judgment dated 29 October 2010, with various parties including the defendants and that Cepatwawasan accepted payment from the D1 as full and final settlement. Therefore, the subject matter of the OS 168 and the enforcement order pursuant to OS 168 was compromised;

(ii) this was material given that the High Court was concerned with the enforcement of rulings made by the plaintiff pursuant to powers vested in it under the listing requirements of Bursa Malaysia Securities Bhd. These powers did not include the power to direct repayment of monies in the manner done by the plaintiff in the case at hand. Notwithstanding, the fact that the enforcement order pursuant to OS 168 was affirmed by the Court of Appeal, it was still open to the defendants to challenge the validity of the same;

(iii) these were grounds available to the defendants to oppose the contempt proceedings and where D1 and D3 were concerned, to oppose an

application for leave under s 8(1) of the BA;

(iv) further, the plaintiff was seeking to enforce a money judgment under which, in so far as the order for repayment of monies to Cepatwawasan was concerned, the plaintiff was not entitled to receipt of the same;

(v) D2 had paid the sum of RM1,020,000 for the fine imposed by the plaintiff; and

(vi) D1 and D3 had not done so given their bankruptcy.

OUR DECISION

Question 1: Where there is non-compliance of an order for the refund of monies which is a money judgment and not a judgment requiring the performance of an act, whether a court can find that there is contempt for the said non-compliance?

[33] We have to remind ourselves that the appeal before us is against the decision of the Court of Appeal which had upheld the decision of the High Court in issuing an order of committal against the defendants pursuant to O 45 r 5(1) of the Rules of Court 2012. The issue herein is whether the defendants had refused to comply with the s 360 of the CMSA order.

[34] The s 360 of the CMSA order reads as follows:

> That within 30 days of the Court of Appeal Order, the 1st and the 2nd appellants, jointly and severally, restore to Cepatwawasan Group Berhad (Cepat Wawasan) the RM13 million paid to Opti Temasek Sdn Bhd; and
>
> That within 30 days of the Court of Appeal order, the appellants, jointly and severally, restore to Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim.

[35] Question 1 posed by the defendant raises the issue of whether monetary judgment can be enforced via committal proceedings. Hence, the submissions of parties with regard to the divergent views as expressed by the Court of Appeal in *Hong Leong Bank Berhad v Phung Tze Thiam @ John Phuang* [2008] MLJU 288; [2008] 4 CLJ 742 and *Hong Kwi Seong v Ganad Media Sdn Bhd* [2013] 2 MLJ 251.

However, before we address this issue, it is important to understand the scope of the s 360 CMSA order, upon which the committal order against the defendants was premised on.

[36] The plaintiff is the frontline regulator of the Malaysian capital market and is tasked with maintaining the integrity of the stock exchange by ensuring compliance with the listing requirements and ensuring proper governance. The plaintiff had found that the defendants' conduct in causing Prolific Yield Sdn Bhd to make payments to Opti Temasek Sdn Bhd and Sheikh Abdul Rahim

were in breach of the financial assistance provisions in the plaintiff's listing requirements. Hence, the s 360 order against the defendants.

[37] Section 360 of the CMSA allowed the plaintiff to seek appropriate orders from the court so that persons in breach of the listing requirements can be compelled by the courts to remedy the breach. This the plaintiff did through the s 360 order.

[38] Looking at the terms of the s 360 of the CMSA order, the terms does not require the defendants to pay the plaintiff. Instead it *compel* the defendants, (who having breached the listing requirements), to *restore* to Cepatwawasan monies which were wrongly paid out to one Opti Temasek Sdn Bhd and one Sheikh Abdul Rahim. This is not a typical debt between the plaintiff and the defendants per se, where the court direct the defendants to make payments to the plaintiff.

[39] The defendants failed to comply with the s 360 of the CMSA order both at the High Court and affirmed by the Court of Appeal. It is to be noted that the defendants have not given any reasonable explanation as to why they could not comply with the s 360 of the CMSA order at the hearing of the committal proceedings.

[40] The order does not require the defendants to make payment to the plaintiff within a stipulated time or otherwise but rather to restore to Cepatwawasan monies which were wrongfully paid out by D1 and D2, as directors of the defendant company, within a stipulated time period.

[41] The plaintiff is not in a debtor and creditor relationship with the defendants. In other words, the plaintiff is not the beneficiary to the payment to be made by the defendants.

[42] Coming back to question 1 posed by the defendants, the issue as to whether it is a monetary judgment or not befitting a committal proceedings from being instituted against the defendants, has not been raised in the courts below. Nowhere did the defendants raised this issue nor canvassed before the judge who heard the committal proceedings and neither was it raised in the Court of Appeal. The judges in the High Court and the Court of Appeal had not addressed their minds to this issue and it would be presumptuous for this court to guess what the High Court and the Court of Appeal would have decided.

[43] In other words, question 1 posed does not relate to a matter in respect of which a determination has been made by the Court of Appeal (see *Meidi-Ya Co Ltd, Japan & Anor v Meidi (M) Sdn Bhd* [2009] 2 MLJ 14).

[44] Question posed before this court must be couched to incorporate a point of law which, if answered in the affirmative or negative has the effect of reversing the conclusions made by the Court of Appeal without any evaluation of the evidence. As the Court of Appeal did not make any determination on this issue, answering the question would not have any effect on the appeal of the defendants.

[45] In *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 at p 232, the Federal Court decline to answer the question framed for its determination when it was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. Haidar Mohd Noor FCJ (as he then was) in delivering the judgment of the Federal Court has this to say:

> It seems to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that we should make would be regrettably decline to answer the question ...

[46] Similarly in the present case, this court was asked to answer an issue which was not determined by the High Court and the Court of Appeal. This court in *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313 had encountered such an occasion when it granted leave to appeal on one question of law. In the course of arguments, the appellants therein took a completely new stand seeking to argue on a new ground which had never been raised previously in the court below. Abdul Hamid FCJ held that:

> [12] The proposed test had not been argued and considered in the courts below. The findings of facts made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The respondents now have a new case to meet. Had the proposed test been argued and accepted by the High Court, *we do not know what the learned judge's findings of facts relevant to the test and what his decision would have been ... The truth is that both the High Court and the Court of Appeal had not addressed their minds to the issue ...*
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> [14] ... I am now of the view that this court (in which I was a member) should not have granted leave to appeal. However, leave having been granted, the issue is whether this court should now answer the question, in the circumstances mentioned above. I am of the view that this court should not do so.
>
> [15] *I have given serious thought whether, I should nevertheless consider the question and give an answer to it. I think I should not. Otherwise, I would be making assumptions of what the learned High Court and Court of Appeal judges would have decided, on facts and law ...*
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> [16] Lastly, I would like to clarify that this judgment is not on the ground that the appeal falls outside the provisions of s 96(a) of the Courts of Judicature Act 1964. On the other hand, it is on the ground that the appeal has taken a new turn completely and to answer the question posed (which issue was never canvassed in

A the courts below) would be a pure academic exercise which requires this court to assume that the facts required to answer the question had been proved, when the courts below had not even addressed their minds to them. Neither should this court assume that they had been proved.

B **[47]** Premised on the aforesaid, we therefore decline to answer question 1.

[48] In addition, cloaked under question 1, the defendants argued that the s 360 of the CMSA order can be challenged collaterally in committal proceedings, and sought to introduce the following arguments which are C outside the scope of this appeal:

(i) that D1 and D3 cannot be said to have mens rea to refuse to obey the s 360 of the CMSA order;

(ii) the plaintiff was not empowered to direct the defendants to restore D monies wrongfully paid out in breach of the plaintiff's listing requirements;

(iii) the High Court was not empowered to make the restoration orders;

(iv) the plaintiff did not have the necessary locus standi to initiate E proceedings for contempt by reason of the consent judgment between the defendants and Cepatwawasan; and

(v) it is not in the public interest for the plaintiff to seek to enforce the s 360 CMSA order.

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[49] The plaintiff submitted that the above issues were canvassed as questions of law at the application for leave to appeal stage at the Federal Court. The Federal Court had considered and declined to grant leave to those questions of law on 16 October 2017 which encompassed the issues raised as G stated in paras [48](i) to (v) above. In the written submissions the plaintiff has reproduced the proposed questions of law which comprised the five issues as stated in in paras [48](i) to (v) above.

[50] As leave was not granted by this court on those questions and issues, the H defendants are not permitted to argue on the same before this court. In this regard r 47 of the Rules of the Federal Court 1995 is relevant, which is the starting point in determining the scope of this appeal:

Rule 47 Appeal to be by notice

I (4) The hearing of the appeal shall be confined to matters, issues or questions in respect of which leave to appeal has been granted.

Raus Sharif CJ in *Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor* [2018] 4 MLJ 34; [2018] 4 CLJ 705 held on a similar issue and ruled that:

> The appeal should be confined only to the questions as determined by this court in granting leave to appeal, and other grounds which are necessary to decide on those questions. As this court has held in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; [1998] 3 CLJ 503 ...
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> ...
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> The parties should confine their submissions to the questions of law posed, and are not entitled to seek a complete rehearing to review the concurrent findings of facts made by the courts below ...

[51] The submissions put forward by counsel for the defendants in support of those issues raised are in effect seeking for a reversal of the finding on the validity of the s 360 of the CMSA order, which is not permitted at this stage. The defendants have exhausted their avenue to challenge the validity of the s 360 of the CMSA order until the Federal Court, in which their application for leave to appeal was dismissed. The s 360 of the CMSA order was appealed upon and upheld in the High Court and the Court of Appeal. Arguments were mounted on the powers of the plaintiff to grant the s 360 of the CMSA order.

[52] The argument to challenge the powers of the plaintiff in directing restitution to be made by the defendants has been superseded by the court granting the s 360 of the CMSA order. It is this precise order that was being enforced through the committal proceedings.

[53] The High Court had original jurisdiction in granting the s 360 of the CMSA order and this was considered and affirmed by the Court of Appeal speaking through Ramli Ali JCA (as he then was) in *Tengku Dato' Kamal Ibni Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158. His Lordship found that the plaintiff could move the court under s 360 of the CMSA for the orders sought and that it was incumbent on the courts to satisfy itself that there was a breach of the relevant listing requirements. The court then concluded that there was a breach of the requirements by the defendants, being directors of Cepatwawasan, given the provisions of s 360 of the CMSA and the role of the plaintiff when His Lordship said:

> [25] The court has the power to make the various orders as set out in s 360 of the CMSA including for the present purposes, an order requiring a person to do anything he is required to do under a relevant requirement and the giving of directions concerning compliance with or enforcement of the rules of stock exchange.
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> ...
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> [34] ... the listing committee of the respondent had correctly founded that Prolific Yield, a wholly subsidiary of Cepatwawasan (a listed issuer) had lent or advance RM16m to Opti Temasek and one Sheikh Abdul Rahim (who was a driver to the 1st appellant) in contravention of the said para 8.23(1) of the LR, and by virtue of paras

> 16.10–16.11 of the LR, all the appellants as directors of Cepatwawasan at the material times were liable for the breach. There is no indication to show that the lending or advancing of the money to these entities falls under any of the permitted acts under para 8.23(1) of the LR.
>
> [35] All the appellants, being directors of Cepatwawasan at the relevant times were responsible of the said breach.
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> ...
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> [37] Under para 16.17 of the LR, there are various penalties that can be imposed by the respondent on a listed company and its directors for any breach of the LR. These include issuance of caution letter, issuance of private or public reprimand, a direction to rectify the non-compliance, suspension of trading, delisting, imposition of fine not exceeding RM1m and any other action which the respondent may deem appropriate.

[54] On the contention of the defendants that the plaintiff's recourse is not within s 360 of the CMSA and that the CMSA only provides for power of enforcement of penalties only to Securities Commission and not the plaintiff; was also addressed by His Lordship at paras [52] and [53] and concluded that the fines imposed were in accordance with the relevant listing requirements by the plaintiff as the stock exchange, not by the Securities Commission. If the plaintiff wishes to enforce the penalties, s 354 of the CMSA is inapplicable. It is s 360(1)(c) of the CMSA which provides for 'an application by an exchange holding company, a stock exchange a futures exchange or an approved clearing house as the case may be, if it appears to the court that any person has contravened a relevant requirement'.

[55] On the issue of the consent judgment entered into by the defendants with Cepatwawasan, His Lordship in *Tengku Dato' Kamal Ibni Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* had also addressed it when His Lordship said that:

> [66] Public interest is best served by the respondent directing the return of the monies paid out in breach of the LR. Notwithstanding the settlement between the parties in the 1168 Suit, public interest and investor's confidence must be protected by ensuing that the respondent can still take action to rectify the breach by directing the return of the monies wrongly paid. The respondent's action based on a breach of the LR does not overlap with the 1168 Suit's cause of action. Therefore, in continuing to maintain the direction that the monies are to be repaid, the respondent is merely carrying out its statutory duty under the CMSA 2007 and enforcing the principles of the LR.

The application for leave to appeal to the Federal Court on the s 360 of the CMSA order by the defendant, was also dismissed.

[56] It is to be borne in mind that the power to order restitution by the plaintiff is provided for under s 360(1)(c)(ii)(M) of the CMSA. Hence, there is

no issue that the court has the authority and jurisdiction to make the s 360 of the CMSA order. In any event it is superfluous to raise the issue whether the plaintiff has the jurisdiction to direct the defendants to restore the monies to Cepatwawasan as the court had issued the s 360 of the CMSA order.

[57] In addition this court is not the proper forum to address this issue as the proper forum to raise the same is at the judicial review proceedings. It has in fact being raised there and it was rejected.

[58] Be that as it may, the plaintiff has relied on para 16.17(1)(b) of the listing requirements when it directed the defendants to make restitution to Cepatwawasan, which has been paid out in breach of paras 8.3, 8.23 and 16.10 of the listing requirements. Paragraph (1)(b)(v) of the plaintiff's listing requirements empowered the plaintiff to 'issue a letter directing the person in default to rectify the non-compliance, which direction will remain in force until it is revoked'.

[59] Hence, to attack the s 360 of the CMSA order by raising it in this present appeal, which is an appeal against the committal order, is a collateral attack, which the Federal Court on 16 October 2017 refused to grant leave to the defendants to pursue this question of whether they can collaterally attack the s 360 of the CMSA order. It is trite law that an order of the court cannot be collaterally attacked in a separate proceedings without it being set aside:

(a) *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689; and

(b) *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689.

Question 2: Where proceedings are commenced for orders under s 360 Capital Markets and Services Act 2007 ('the CMSA') against a bankrupt, whether the plaintiff is obliged to obtain leave pursuant to s 8(1) of the Bankruptcy Act 1967

[60] Question 2 only relates to D1 as he was a bankrupt at the time the committal proceedings was commenced. D2 is not a bankrupt and D3 was only made a bankrupt after the s 360 order was obtained.

[61] We agree with the submissions by the plaintiff that this question seek to challenge the validity of the s 360 CMSA order.

[62] At the time when the filing of the proceedings to obtain the s 360 order was instituted by the plaintiff, D1 was already a bankrupt. However, at that point in time, D1 failed to disclose the fact that he was a bankrupt and therefore did not seek the necessary sanction and approval to appoint solicitors

to represent him in those proceedings. In those proceedings D1 never at all raised the fact that he was a bankrupt.

[63] The appeal before us is on the determination by the courts below on the orders of committal against the defendants made by the High Court on *1 July 2016* and affirmed by the Court of Appeal on *13 February 2017*. It is never to consider whether the s 360 CMSA order was valid or not.

[64] Hence, it is not for this court to consider the validity of the s 360 CMSA order (which was dated 28 December 2010) at this stage, when this issue was never addressed at all in the court below. The validity of the s 360 CMSA order was affirmed by the Court of Appeal on 16 December 2010 and leave to appeal to the Federal Court was dismissed on 28 December 2013. It is not for this court to reverse the decision of the courts below premised on the question posed when the issue raised in the question was never addressed, argued nor canvassed by the parties before the courts below which had not made any determination on the issue in question.

[65] Essentially, the manner in which question 2 is framed also amounts to a collateral attack on the s360 CMSA order, which the law does not permit, given that D1 attempted and failed to challenge the s 360 CMSA order in the High Court and the Court of Appeal. He has exhausted all avenues of appeal right up to the Federal Court to challenge the validity of the s 360 CMSA order but failed. Hence, the s 360 CMSA order, for all intents and purposes are valid and binding. The Federal Court in *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689 was instructive in this regard:

> [59] It cannot be opened to any person to decide upon himself whether an order of a court which binds him is wrongly issued and does not require his obedience. Until such time it is set aside or varied the order of court is entitled to the obedience and respect from all parties. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences (see *Wee Chee Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217).
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> [60] It must be borne in mind that, there is a legal presumption that an order of a court is validly made, unless it was obtained by fraud, etc. It bears repeating that the 1995 order was made by the High Court with unqualified participation of all relevant parties. The parties were also represented by their respective counsel as disclosed in the 1995 order itself. A court order regularly made cannot be ignored on the belief of a party that is a nullity. Any such attempt would militate against the basic legal position as pronounced in the various earlier cases on the subject, that a regularly made order of court must be observed at all costs.
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> ...
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> [66] It is, therefore, a long established principle of law that one may apply to set aside an order of a superior court but it must be made in a direct and specific

proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well as the finality of an order of court ...

[66] Given the aforesaid, we decline to answer question 2.

Question 3: Where committal proceedings are commenced to enforce an order made under s 360 of the CMSA, against a bankrupt whether the applicant is obliged to obtain leave pursuant to s 8(1) of the Bankruptcy Act 1967

[67] Section 8(1) of the BA provides:

8(1) Effect of receiving order

On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, *no creditor* to whom the *debtor is indebted* in respect of any *debt provable in bankruptcy* shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[68] Section 8(1) applies to a creditor. The plaintiff in our case is not a creditor where the defendant owes a debt, whether provable in bankruptcy or otherwise.

[69] The s 360 of the CMSA order does not create a creditor-debtor relationship.

[70] This section is applicable in situation where the plaintiff imposed a fine on those who breached any of the listing requirements. In those situations the fines are debts to the plaintiff.

[71] However, the s 360 of the CMSA order directs the defendants to restore monies to Cepatwawasan upon which the committal proceedings are premised. It does not create a debt between the plaintiff and the defendant.

[72] Section 8(1) also mention 'debt provable in bankruptcy' which is defined in s 2 of the BA as 'any debt or liability by this Act made provable in bankruptcy'. 'Debts provable in bankruptcy' are set out in s 40 of the BA:

Proof of Debts

40 Description of debts provable in bankruptcy

A (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the receiving order for *any debt or liability* B contracted by the debtor subsequent to the date of his so having notice.

(3) Save as provided in subsections (1) and (2) *all debts and liabilities* present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the C receiving order shall be deemed to be debts provable in bankruptcy.

Hence, the issue to be determined is whether the monies mentioned in the s 360 CMSA order is 'a debt provable in bankruptcy' within the meaning of s 40 of the BA.

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[73] The monies as referred to, in the s 360 of the CMSA order are not debts nor liabilities as envisaged under s 40 of the BA.

[74] Hence, s 8(1) has no application whatsoever to our present case as there E is no debt owing by the defendant to the plaintiff. The prohibition in s 8(1) of the BA applies to a creditor which the plaintiff is not, nor is s 360 of the CMSA order a 'debt provable in bankruptcy'.

[75] It is to be noted that questions 2 and 3 are not applicable to D2 who is F not a bankrupt and those questions are also not applicable to D3 who was only made a bankrupt after the s 360 CMSA was made. In any event, this issue was never raised in the courts below.

Therefore, we decline to answer question 3.

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CONCLUSION

[76] We held that the three questions of law posed to us do not relate to the matter in respect of which a determination has been made by the High Court H and the Court of Appeal. This is apparent from the High Court and the Court of Appeal grounds of judgment and parties' written submissions at the Court of Appeal.

[77] The issues raised in the proposed questions were also not addressed nor I argued in the judicial review proceedings nor in the OS 168 proceedings.

[78] Hence, the issues raised in the three questions do not arise from the judgments of the High Court or the Court of Appeal in the committal proceedings.

[79] We take note that leave has been granted by this court in respect of the three questions, however that does not prevent us from declining to answer those questions based on the aforesaid reasons. Similar stand were taken by this court in:

(a) *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; and

(b) *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513,

where, despite leave was granted, that does not prevent the court from declining to answer the questions posed when the issue/matter raised in the question was not an issue/matter that arose or was decided by the High Court and/or the Court of Appeal.

[80] Answering the questions would not have determinative effect on the appeal before this court. In this regard we reiterate what was said by the Federal Court in *Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd* [2010] 5 MLJ 222 which held that:

> [10] Such being the case, we held that the questions posed were not properly framed under s 96(a) of the Act. Further, they do not relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. Neither is there any evidence that the issue of legality of the contract was ever raised in the Court of Appeal. So, it would be a waste of judicial time and indeed not a proper exercise of authority of this court to engage itself in deciding such questions the answer to which would not have the effect of reversing the judgment of the Court of Appeal. The court would not indulge in a fruitless exercise. Thus, this court has the power to decline to answer the questions posed despite the fact that leave to appeal had been granted. In the result, we decline to answer the questions and dismissed the appeal without considering the merits.

[81] Hence, given the circumstances, we decline to answer the three questions posed, despite leave has been granted.

[82] The appeal is hereby dismissed with costs of RM50,000 subject to allocator and the decision of the Court of Appeal is affirmed.

Appeal dismissed with costs of RM 50,000 subject to allocator; and Court of Appeal decision affirmed.

Reported by Ashok Kumar